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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-555

GARY LEE McINTYRE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
257 South Spring Street
Los Angeles, California 90012
Phone: (213) 625-1693
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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IN THE

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No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1971, and the denial of Petition for Rehearing was entered on September 20, 1971, Appendix B to this petition.

This Petition for a Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The Motions for Judgment of Acquittal and the briefing in the Court of Appeals raised the following questions including the one of late crystallization of conscientious objections, considered by this Court in *Ehlert* v. *United States,* 402 U.S. 99, 91 S.Ct. 1319 (1971).

A. This petitioner questions the applicability of *Ehlert* to him and also validity of the explicitly stated *factual* basis given by this Court for *Ehlert.*

B. Whether *Mulloy* v. *United States,* 398 U.S. 410 (1970), requires a reopening of a registrant's classification postured as petitioner's.

C. Also, whether the recognition by the Department of Defense that its DoD 1300.6 should be amended to bring military practice to a state of consistency with this Court's prophetic *Ehlert* decision, supra, of April 21, 1971, gives protection to men, like this petitioner, who when they were administratively processed did not have a forum available.

D. Constitutional questions, applicable to men postured as this petitioner.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment and 32 C.F.R. § 1625.2. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged McIntyre with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 1].

Petitioner pleaded "not guilty" and was tried by the Honorable A. Andrew Hauk, District Judge, sitting alone without a jury. He was found guilty and given a probationary sentence [CT 17], and is on bail pending appeal.

A written Motion for Judgment of Acquittal had been filed during the trial [CT 132].

6. THE FACTS

The facts are found in the Selective Service file of this petitioner.

When he was ordered to report for induction he wrote the local board:

"Dear Sirs:

> May I please have the conscientious objector form? I will fill it out and turn it in today. I have sat down in the last several days and thought about this matter a great deal and have finally made up my mind.

"I also ask that you reopen my classification and consider my claim.

"I would like to meet the board face to face, and therefore, ask that my induction be postponed for a few days.

s/ Gary Lee McIntyre
Gary Lee McIntyre
4 135 45 61" [Ex. 32].

He was sent the form and he filed it within the time the form specified [Ex. 33].

The local board sent him a rejection [Ex. 38] and did not give him an opportunity to meet with it [R.T. 4].

He reported at the entrance station but refused to submit to induction [Ex. 42-43].

7. REASONS FOR GRANTING WRIT

The Court should consider anew its *Ehlert* decision because it *now* is demonstrable that the explicit reason for the Court's conclusion was without sufficient *factual* basis the Department of Defense having provided, in August, 1971, a forum for men such as this petitioner. McIntyre had no forum when he was ordered to report for induction.

8. ARGUMENT

Ehlert should not be applied to McIntyre. *Ehlert* explicitly turned on a factual assumption that *demonstrably* is without basis-in-fact with respect to McIntyre.

This Court said in *Ehlert*:

"We are assured, however, by a letter included in the briefs in this case from the General Counsel of the

> Army to the Department of Justice, that present practice allows presentation of such claims and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims. *Our conclusion in this case is based upon that assurance.*" 91 S.Ct. 1319, 1324-1325 (Italics supplied).

Counsel for this petitioner has pending before the Court other petitions for writs of certiorari on behalf of men postured as was this petitioner, McIntyre.

The government in its last Memorandum for the United States in Opposition closes with "There is thus little reason to assume that the military intends now to break with its past practice—as reflected in the assurance given in *Ehlert* (402 U.S. at 107-108)—of considering post-notice conscientious objector claims that are foreclosed by regulation (32 C.F.R. 1625.2) from review by Selective Service."

Assuming *arguendo* that the government's above statement is a substantially accurate representation of the military's "past practise" how was a man to know? The language of the regulations of each service, the language of the DoD itself, and the language and the holdings of the courts *all* said No, your objections must have become fixed after you entered the service.

We will now show that providing a meaningful forum for men so postured has not been the "practise" of the military.

A.

Experience Subsequent to Ehlert

The most recent information that has come to notice of counsel is the experience of Pfc. Martin A. Rush, No. 588-88-6961 at Fort Ord, Fort Ord, California.

Rush, a Pima Indian, had his application for discharge, based on his conscientious objections to war, denied on July 24, 1971.

One of the two reasons given was that "applicant's professed views became fixed prior to his entry into the active military service." A true and correct copy of this decision is set forth in Appendix D.

The 03 Hearing in this instance more than met the requirement that the 03 officer be "knowledgeable" [AR 635-20, ¶4, (b) (3)] in that it was conducted by legally trained officers, three in fact [the only military installation where counsel has encountered a panel] all Judge Advocate General (JAG) officers. It is noteworthy that none had heard of the "practise" the General Counsel referred to.

Other *post-Ehlert* experiences of counsel on the same point, are related in "companion" petitions previously filed this term: Taggart, No. 70-341, Farrell, No. 71-77, Roy, No. 71-77 and Kilty, No. 71-290.

In short, the army may have given a soldier in the no-man's land posture the opportunity to *file* an AR 635-20 application but it did not give him a meaningful, if any, *consideration* for discharge, just as the regulation required.

B.

Court Construction

There is overwhelming judicial opinion that the factual basis for this court's decision was unfounded and that the language of both the DoD 1300.6 and the AR 635-20 was uniformly considered plain, and that there was no ambiguity, and must be followed by the military.

All judicial experience supports this claim of petitioner. If the Court intends to overrule all the courts be-

low on this point as it has already done in one area of *Ehlert* [with respect to those judges who support the uncontrollableness of conscience in relation to the "crystallization" doctrine] it is respectfully suggested that an explicit pronouncement would be in order, as in *Estep* v. *United States,* 327 U.S. 114, where the concurring opinion of Mr. Justice Frankfurter cataloged such an explicit repudiation of all Court of Appeals judges, but one (f. 1, pp. 138-139).

We presented, in the "companion" petitions, a one or two paragraph analysis of the determinations of over two dozen courts that support our thesis. They contradict the "assurance" passed on to this Court by the General Counsel of the Army.

What governs procedures in the army? The ARs, the army regulations. How much weight should the Court give a letter from the General Counsel, based on reports to him, augmenting the record?

On a battlefield a recognized means of communication, in small units is "Pass the Word." If the General Counsel adds "I'm Passing the Word" then a little more weight is to be given his good offices. In army officer groups a well recognized means of communicating is "Pass the Word."

But what has been, and what *is,* the practise of the army in our context? We covered this subject in the "companion" petitions.

C.

Reweigh the "Assurance"; the Military's Repeated Violation of Even Mandatory Regulations Is Ominous

In the "companion" petitions counsel, by affidavit and court decisions, showed that the army in too many instances violate clearly stated regulations such as the ones

requiring "knowledgeable" hearing officers, ones not "in the chain of command," and marginal matters such as refusing to give counsel a copy of the report on which the determinations were made. Twelve printed pages were devoted to this subject in Kilty's petition, No. 71-290.

D.

After Ehlert, on August 20, 1971, the Department of Defense Provided a Forum

The four other "companion" petitions devoted all of their Supplement to their petitions filed on September 15, 1971 to set forth the Amendment to DoD 1300.6 and to show it *now* provides a forum for men like petitioner, a forum lacking at the time of their refusal to submit to the draft board's orders.

CONCLUSION

For the above reasons certiorari should be granted.

Respectfully submitted,

J. B. TIETZ
257 South Spring Street
Los Angeles, California 90012
Phone: (213) 625-1693
Attorney for Petitioner

October 18, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GARY LEE McINTYRE,
Defendant-Appellant.

No. 71-1386

Order

Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges

The judgment is affirmed. *Ehlert* v. *United States*, ... U.S. ....., 1971.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY LEE McINTYRE,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 71-1386

Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges

Order

The petition for rehearing is denied.

APPENDIX C

Amendment Involved

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Regulation Involved

Section 1625.2 of the Selective Service Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1961)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided,* in either event, the classification of a registrant shall not be reopened after the

local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

APPENDIX D

ACTION COPY

24 Jul 71 0 4 1 4 z

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UNCLAS
AGPO-SS

FOR AMNOR—AGFP

SUBJ: APPL FOR SEP AS CONOBJTR

APPL SGN BY PVT MARTIN A RUSH, SSAN 588-88-6961, HHC, 3RD SN, 1ST BCT BDE, FT ORD, CA 93941, IS DISAPPROVED. 'APPLICANT LACKS THE DEPTH OF CONVICTION REQUIRED TO QUALIFY FOR DISCHARGE AS A CONSCIENTIOUS OBJECTOR!' ALSO 'APPLICANT'S PROFESSED VIEWS BECAME FIXED PRIOR TO HIS ENTRY INTO THE ACTIVE MILITARY SERVICE.' EM SHOULD BE NOTIFIED OF THIS DECISION ASAP. ONCE EM HAS BEEN NOTIFIED OF DECISION ANY PNDG PERS ACTION SHOULD BE TAKEN. APPL BEING RETURNED TO EM USC. REQUEST ACKNOWLEDGEMENT WITHIN 72 HRS OF REC.

BT

G695B

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-555

GARY LEE MCINTYRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of willfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to the custody of the Attorney General for three years. The Court of Appeals affirmed (Pet. App. A 1).

Petitioner registered with his local board in Orange County, California, on February 5, 1963 (SSF 1, 2).

On February 15, 1965, having informed the board that he was married, petitioner was given a fatherhood (III-A) deferment (SSF 5, 11, 12). He held that classification until May 14, 1969, when the board reclassified him I-A upon hearing that he had been divorced for some two years (SSF 11, 20, 23). On November 3, 1969 petitioner was ordered to report for induction on November 25, 1969 (SSF 29).

The day before the scheduled reporting date, on November 24, 1969, the board received a letter from petitioner requesting, for the first time, the Special Form for Conscientious Objectors (SSS Form 150). The letter stated (SSF 32), in part, "I have sat down in the last several days and thought about this matter a great deal and have finally made up my mind." The form was mailed to petitioner and his induction was postponed. He promptly completed and returned the form to the board, and, shortly thereafter, he was notified that the board had refused to reopen his classification since petitioner had not demonstrated "a change in status resulting from circumstances over which [he] had no control" (SSF 38).

He was ordered to report for induction on February 17, 1970 (SSF 11, 39). Petitioner did report, but, when called upon to take the symbolic step forward, he refused. The present indictment and conviction followed, and the court of appeals affirmed (Pet. App. A 1), relying on this Court's decision in *Ehlert* v. *United States*, 402 U. S. 99.

Petitioner asks this Court to reconsider its decision in *Ehlert* v. *United States*, *supra*. The various argu-

ments advanced by petitioner's counsel are the same that he has made in *Farrell and Roy* v. *United States*, No. 71-77, this Term, certiorari denied, October 12, 1971; *Taggart* v. *United States*, No. 70-341, this Term, certiorari denied, October 12, 1971; and *Kilty* v. *United States*, No. 71-290, this Term, certiorari denied, November 9, 1971. For the reasons stated in the government's responses in those cases, there is no cause for further review in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 451014 330